Trujillo v. Apple Computer, Inc. et al Doc. 148

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSE TRUJILLO, individually and on behalf of all similarly situated, Plaintiff, v. APPLE COMPUTER, INC., a California corporation and AT&T MOBILITY LLC, a Georgia corporation, Defendants.	)	Case No. 07-CV-04946 Judge Kennelly

DEFENDANT AT&T MOBILITY LLC'S RULE 56.1 STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Rule 56.1(a), Defendant AT&T Mobility LLC ("ATTM") submits the following Statement of Undisputed Material Facts in Support of Its Motion for Summary Judgment. With the exception of the Declaration of Caroline Mahone-Gonzalez, all of the materials relied upon to support this statement of facts are already part of the record in this case. Materials already in the record are referenced herein by title and docket entry number (*i.e.*, Docket No. ___).

I. Parties, Jurisdiction, and Venue

1. Plaintiff Jose Trujillo ("Plaintiff") is an individual who alleges that he resides in Melrose Park, Illinois. First Am. Compl. ¶ 1, Docket No. 6.

2. Defendant ATTM is a Delaware limited liability company with its principal place of business located in Atlanta, Georgia. Defendant AT&T Mobility LLC's Statement of Citizenship, Docket No. 91.

Dockets.Justia.com

3. ATTM is comprised of five members, whose citizenships are as follows: two Delaware corporations (AT&T Mobility Corporation and New BellSouth Cingular Holdings, Inc.) with principal places of business in Georgia; one Delaware corporation (SBC Alloy Holdings, Inc.) with its principal place of business in Texas; one Georgia corporation (BellSouth Mobile Data, Inc.) with its principal place of business in Georgia; and one Delaware limited liability company (SBC Long Distance, LLC) whose sole member (SBC Telecom, Inc.) is a Delaware corporation with its principal place of business in Texas. *Id.*

4. Subject matter jurisdiction exists over this action pursuant to diversity jurisdiction as set forth in 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005. First Am. Compl. ¶ 4 , Docket No. 6.

5. Venue lies in this District, as Plaintiff alleges that he purchased an iPhone from an Apple retail store located in Oak Brook, Illinois. *Id.* ¶ 8.

II. The iPhone Launch on June 29, 2007

6. Apple began selling the iPhone on June 29, 2007. *Id.* ¶ 7; Declaration of Douglas Vincent in Support of Apple's Motion for Summary Judgment ("Vincent Decl.") ¶ 3, Docket No. 56.

III. Plaintiff's iPhone

7. Plaintiff Jose Trujillo purchased a 2G iPhone at an Apple retail store located in Oak Brook, Illinois on July 2, 2007. First Am. Compl. ¶ 8, Docket No. 6; Declaration of Caroline Mahone-Gonzalez in Support of Defendant AT&T Mobility LLC's Motion for Summary Judgment ("Mahone-Gonzalez Decl.") ¶ 3.

8. Trujillo received a receipt for his purchase of the iPhone. Plaintiff's Supplemental Response to Defendant AT&T Mobility LLC's Motion to Compel Arbitration, and to AT&T Mobility LLC's Citation to Supplemental Authority, at 3, Docket No. 86.

9. Trujillo's receipt identified the serial number of that iPhone as YM724N1AVR0. *Id.*, Ex. B.

10. Certain mobile phones, including every 2G iPhone, are assigned International Mobile Equipment Identity ("IMEI") numbers. Mahone-Gonzalez Decl. ¶ 6.

11. The iPhone with Apple serial number YM724N1AVR0 corresponds to the iPhone with IMEI number 011245000436384. Declaration of Patrick Eckstrand in Support of AT&T Mobility LLC's Motion to Compel Arbitration and Dismiss Action ("Eckstrand Decl.") ¶ 2, Docket No. 105.

12. In order to activate a 2G iPhone for use with ATTM's network, a customer must use the iTunes program on their computer to enter into a wireless service agreement with ATTM. Mahone-Gonzalez Decl. ¶ 7.

13. According to ATTM's records, Trujillo neither activated that iPhone nor entered into a service agreement for the iPhone at issue. The iPhone with the serial number printed on Trujillo's receipt, Serial No. YM724N1AVR0, instead corresponds to an iPhone activated on July 3, 2007 by a preexisting ATTM customer named Dawn Marie Trujillo on her own account, on which Jose Trujillo was not an authorized user. *Id.* ¶¶ 8–9.

14. According to ATTM's records, Dawn Marie Trujillo cancelled service on that iPhone on December 15, 2007. *Id.* ¶ 10.

15. According to ATTM's records, Plaintiff Jose Trujillo subsequently activated on his own new account an entirely different 2G iPhone, which Dawn Marie Trujillo had purchased

from an ATTM retail store. *Id.* ¶ 11; Declaration of Ramoncito Balce in Support of AT&T Mobility LLC's Motion to Compel Arbitration and Dismiss Action ("Balce Decl.") ¶¶ 3–9, Ex. 1–3, Docket No. 106.

16. As of July 2, 2008, Plaintiff Jose Trujillo has not alleged that he sustained any battery-related problem or cost. Plaintiff's Response to Defendant Apple Inc.'s Rule 56.1 Statement of Undisputed Material Facts in Support of Its Motion for Summary Judgment ¶ 48, Docket No. 118; *see also* Mahone-Gonzalez Decl. ¶¶ 10, 12.

IV. The iPhone Feature Label

17. A feature label is affixed to the box in which each iPhone is sold. Declaration of Peggy Jensen in Support of Apple's Motion for Summary Judgment ("Jensen Decl.") ¶ 2, Docket No. 57.

18. The feature label affixed to the iPhone box states:

> Battery has limited recharge cycles and may eventually need to be replaced by Apple service provider. Battery life and charge cycles vary by use and settings. See www.apple.com/batteries.

Id. ¶ 3 & Ex. A.

19. The feature label affixed to the iPhone box also states that a "Minimum new two-year wireless service plan with AT&T [is] required to activate all iPhone features, including iPod features." *Id.*, Ex. A.

20. The feature label for the iPhone did not change from the time the product first went on sale on June 29, 2007 through at least December 5, 2007. *Id.* ¶ 4.

V. The iPhone In- Box Product Information Guide

21. Included within each iPhone box is a paper copy of the "Important Product Information Guide" for iPhone. *Id.* ¶ 5.

22. The Important Product Information Guide for the iPhone states:

> Never attempt to repair or modify iPhone yourself. iPhone does not contain any user-serviceable parts, except for the SIM card and SIM tray . . . The rechargeable battery in iPhone should be replaced only by an Apple Authorized Service Provider. For more information about batteries, go to www.apple.com/batteries.

Id. ¶ 5; Declaration of Carol Jinks in Support of Apple's Motion for Summary Judgment ("Jinks Decl.") ¶ 3 & Ex. A, Docket No. 58.

23. The Important Product Information Guide for iPhone has contained this language from the time the iPhone went on sale on June 29, 2007 through at least December 5, 2007. Jensen Decl. ¶ 6, Docket No. 57; Jinks Decl. ¶ 4, Docket No. 58.

24. The Important Production Information Guide is also available online on Apple's web site at www.apple.com/support/manuals/iphone. Jinks Decl. ¶ 2, Docket No. 58.

25. The Important Product Information Guide was uploaded and accessible to the public on Apple's web site from June 29, 2007 through at least December 5, 2007. *Id.* ¶ 2.

VI. Apple's Web Site Disclosures

26. Apple has posted an iPhone User's Guide on its web site at www.apple.com/support/manuals/iphone. *Id.* ¶ 5.

27. The iPhone User's Guide was uploaded and accessible to the public on Apple's web site beginning on June 29, 2007 through at least December 5, 2007. *Id.* ¶ 5.

28. In "Chapter 2: Basics," under the heading "Charging the Battery" on page 27, the iPhone User's Guide states:

> Rechargeable batteries have a limited number of charge cycles and may eventually need to be replaced. The iPhone battery is not user replaceable; it can only be replaced by an authorized service provider. For more information, go to: www.apple.com/batteries.

Id. ¶ 6 & Ex. B.

29. In "Appendix A: Safety and Handling," under the heading "Repairing iPhone" on page 112, the iPhone User's Guide states:

> Never attempt to repair or modify the iPhone yourself. iPhone does not contain any user-serviceable parts, except for the SIM card and tray . . . The rechargeable battery in iPhone should be replaced only by an Apple Authorized Service Provider. For more information about batteries, go to www.apple.com/batteries.

Id. ¶ 7 & Ex. B.

30. The above-quoted text in paragraphs 28 and 29 has been included in the iPhone User's Guide at all times through at least December 5, 2007. *Id.* ¶ 8.

31. The web page at www.apple.com/batteries was updated with iPhone-specific information on June 29, 2007. Vincent Decl. ¶ 4, Docket No. 56.

32. That web page (www.apple.com/batteries) has been accessible to the public on Apple's web site from June 29, 2007 through at least December 5, 2007. *Id.* ¶ 4.

33. That web page (www.apple.com/batteries) includes the following statements regarding rechargeable lithium-ion batteries:

> Like other rechargeable batteries, these batteries may eventually require replacement.
>
> You can charge all lithium-ion batteries a large but finite number of times, as defined by charge cycle.
>
> A charge cycle means using all of the battery's power, but that doesn't necessarily mean a single charge. For instance, you could listen to your iPod for a few hours one day, using half its power, and then recharge it fully. If you did the same think the next day, it would count as one charge cycle, not two, so you may take several days to complete a cycle. Each time you complete a charge cycle, it diminishes battery capacity slightly, but you can put notebook, iPod and iPhone batteries through many charge cycles before they will hold only 80% of original battery

> capacity. As with other rechargeable batteries, you may eventually need to replace your battery.
>
> **Battery Lifespan** means the total amount of time your battery will last before it may be replaced.

Id. ¶ 5 & Ex. A.

34. The above-quoted text in paragraph 33 has been included at all times from June 29, 2007 through at least December 5, 2007. *Id.* ¶ 6.

35. That web page also contains links to other web pages. One of those web pages (www.apple.com/batteries/iphone.html) provides pointers for maximizing the lifespan of the iPhone battery. Another web page (www.apple.com/batteries/replacements.html) provides information about Apple's battery-replacement program. *Id.* ¶¶ 7, 11 & Exs. A–C.

36. That second web page (www.apple.com/batteries/iphone.html) was uploaded and accessible to the public on Apple's web site from June 29, 2007 through at least December 5, 2007. *Id.* ¶ 10.

37. The iPhone-battery tips web page (www.apple.com/batteries/iphone.html) also states:

> "Battery lifespan means the total amount of time your battery will last before it must be recharged.
>
> **Charge Cycles:** A properly maintained iPhone battery is designed to retain up to 80% of its original capacity at 400 full charge and discharge cycles. You may choose to replace your battery when it no longer holds sufficient charge to meet you needs.

Id. ¶ 11 & Ex. C.

38. The above-quoted text in paragraph 37 has been included at all times from June 29, 2007 through at least December 5, 2007. *Id.* ¶ 12.

39. The battery-replacement web page (www.apple.com/batteries/replacements.html) was updated with iPhone-specific information on June 29, 2007. *Id.* ¶ 7.

40. The battery-replacement web page (www.apple.com/batteries/replacements.html), with the iPhone specific updates, has been accessible to the public on Apple's web site from June 29, 2007 through at least December 5, 2007. *Id.* ¶ 7.

41. The battery-replacement web page (www.apple.com/batteries/replacements.html) provides detailed information regarding Apple's battery replacement program. For the iPhone, it contains the following information:

> **iPhone Owners.** Your one-year warranty includes replacement coverage for a defective battery. You can extend your coverage to two years from the date of your iPhone purchase with the AppleCare Protection Plan for iPhone. During the plan's coverage period, Apple will replace the battery if it drops below 50% of its original capacity. If it is out of warranty, Apple offers a battery replacement for $79, plus $6.95 shipping, subject to local tax.

Id. ¶ 8 & Ex. B.

42. The above-quoted text in paragraph 41 has been included at all times from June 29, 2007 through at least December 5, 2007. *Id.* ¶ 9.

43. Apple first posted technical specifications for the iPhone on its web site on January 9, 2007, at www.apple.com/iphone/technology/specs.html. *Id.* ¶ 13.

44. Those technical specifications stated:

> Rechargeable batteries have a limited number of charge cycles and may eventually need to be replaced. Battery life and number of charge cycles vary by use and settings. See www.apple.com/batteries for more information.

Id. ¶ 13 & Ex. D.

45. More detailed technical specifications for the iPhone were uploaded and accessible to the public on Apple's web site at www.apple.com/iphone/specs.html from June 19, 2007 through at least December 5, 2007. *Id.* ¶ 14.

46. The technical specifications uploaded on June 19, 2007 replaced the technical specifications discussed in paragraphs 43 and 44. *Id.* ¶ 15.

47. The technical specifications uploaded on June 19, 2007 state:

> Rechargeable batteries have a limited number of charge cycles and may eventually need to be replaced. See www.apple.com.com/batteries for more information.

Id. ¶ 14 & Ex. E.

48. The quoted content from the iPhone technical specifications that was uploaded on June 19, 2007 has been included at all times through at least December 5, 2007. *Id.*¶ 15.

49. Support pages for the iPhone were uploaded to Apple's web site for the iPhone on June 29, 2007. Declaration of Lance Kunnuth in Support of Apple's Motion for Summary Judgment ("Kunnuth Decl.") ¶ 2, Docket No. 59.

50. The web pages at www.apple.com/support/iphone/service/battery and www.apple.com/supportiphone/service/faq have been accessible to the public on Apple's web site from June 29, 2007 through at least December 7, 2007. *Id.* ¶ 2.

51. The web page at www.apple.com/support/iphone/service/battery contains Frequently Asked Questions ("FAQ") regarding the iPhone Out-of-Warranty Battery Replacement Program, including the following information:

> **What is the iPhone Battery Replacement Program?**
>
> If your iPhone requires service only because the battery's ability to hold an electrical charge has diminished, Apple will repair your iPhone for a service fee of $79, plus $6.95 shipping. . . .

> **How much does it cost to participate in the program?**
>
> The program costs $79, plus $6.95 shipping. The program cost is $85.95 per unit. All fees are in US dollars and subject to local tax. . . . Please review Apple's Repair Terms and Conditions for further details.
>
> **Will the data on my iPhone be preserved?**
>
> No, the repair process will clear all data from your iPhone. It is important to sync your iPhone with iTunes to back up your contacts, photos, email account settings, text messages, and more. Apple is not responsible for the loss of information while servicing your iPhone and does not offer any data transfer service. . . .
>
> **How long will service take?**
>
> The repair process normally takes three business days. See the iPhone Service FAQ for information about getting an AppleCare Service Phone for you to use with all of your data while your iPhone is being repaired.

Id. ¶ 3 & Ex. A.

52. The above-quoted text in paragraph 51 has been included on that web page from June 29, 2007 through at least December 7, 2007. *Id.* ¶ 4.

53. The web page at www.apple.com/support/iphone/service/faq contains answers to Frequently Asked Questions (FAQ) about the iPhone repair process and the iPhone warranty, as well as about AppleCare Service Phones. *Id.* ¶ 5.

54. From the time that Service FAQ was originally uploaded on June 29, 2007 until November 2007, it disclosed the availability and cost of AppleCare Service Phones as follows:

> **If I need to have my iPhone repaired, will I be able to borrow an iPhone to use?**
>
> Apple can provide an AppleCare Service Phone for you to use with all of your data while your iPhone is being repaired. The service fee for the AppleCare Service phone is $29. For more details please review the iPhone Rental Terms and Conditions.

Id. ¶ 5.

55. While the precise wording of the Service FAQ was changed in November 2007, through at least December 7, 2007 it always disclosed the availability and $29 cost of AppleCare Service Phones for rental while a customer's unit is being repaired. *Id.* ¶ 6.

Dated: January 9, 2009

Respectfully submitted,

AT&T MOBILITY LLC

By: /s/ Victoria R. Collado
One of Its Attorneys

Victoria R. Collado
Sarah E. Reynolds
Emily M. Emerson
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
Tel: (312) 782-0600
Fax: (312) 263-7711

Evan M. Tager (*pro hac vice*)
Archis A. Parasharami (*pro hac vice*)
Kevin Ranlett (*pro hac vice*)
MAYER BROWN LLP
1909 K Street, N.W.
Washington, DC 20006
Tel: (202) 263-3000
Fax: (202) 263-5000

CERTIFICATE OF SERVICE

I, Emily M. Emerson, an attorney, hereby certify that on January 9, 2009, I electronically filed the foregoing **DEFENDANT AT&T MOBILITY LLC'S RULE 56.1 STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** and attached **DECLARATION OF CAROLINE MAHONE GONZALEZ IN SUPPORT OF AT&T MOBILITY LLC'S MOTION FOR SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

James R. Rowe
THE LAW FIRM OF JAMES R. ROWE & ASSOCIATES
205 West Randolph, Suite 1430
Chicago, IL 60603
(312) 345-1357
rowelegal@gmail.com

Larry D. Drury
LARRY D. DRURY, LTD.
205 West Randolph, Suite 1430
Chicago, IL 60603
(312) 346-7950
ldrurylaw@aol.com

Patrick T. Stanton
SCHWARTZ COOPER CHARTERED
180 North LaSalle Street, Suite 2700
Chicago, Illinois 60601
pstanton@scgk.com

Penelope A. Preovolos
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
ppreovolos@mofo.com

Respectfully submitted,

/s/ Emily M. Emerson

Dated: January 9, 2009

Attorney for Defendant AT&T Mobility LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JOSE TRUJILLO, individually and on behalf of all others similarly situated, Plaintiff, vs. APPLE COMPUTER, INC., a California Corporation, and AT&T MOBILITY LLC, a Georgia Corporation, Defendants.	Case No. 1:07-cv-04946 DECLARATION OF CAROLINE MAHONE-GONZALEZ IN SUPPORT OF AT&T MOBILITY LLC'S MOTION FOR SUMMARY JUDGMENT

I, Caroline Mahone-Gonzalez, hereby declare as follows:

1. The following facts are of my own personal knowledge, and if called as a witness I could and would testify competently as to their truth.

2. I am employed by AT&T Mobility LLC ("ATTM") as an Area Manager in the West region of the Office of the President. I am familiar with the service agreements under which ATTM provides wireless service to its subscribers and the manner in which in the regular and ordinary course of business those agreements and records pertaining to customers are stored and may be retrieved.

3. I have reviewed a receipt, which I have been informed that Plaintiff Jose Trujillo included in a court filing, which indicates that Plaintiff Jose Trujillo purchased an iPhone from an Apple retail store in Oak Brook, Illinois on July 2, 2007. Based on the date of purchase, that iPhone was a 2G iPhone.

4. That receipt indicates that the Apple serial number for the purchased iPhone is YM724N1AVR0.

5. It is my understanding, from the declaration of Patrick Eckstrand filed in this case, that the iPhone with Apple serial number YM724N1AVR0 also has the International Mobile Equipment Identity ("IMEI") number 011245000436384.

6. IMEI numbers are identifying numbers that are assigned to GSM and UMTS mobile phones (among others), including each iPhone.

7. In order to activate a 2G iPhone for use with ATTM's network, a customer must use the iTunes program on his or her computer to enter into a wireless service agreement with ATTM.

8. According to ATTM records that I have reviewed, a preexisting ATTM customer named Dawn Marie Trujillo activated the iPhone with IMEI number 011245000436384 (the iPhone Plaintiff Jose Trujillo purchased from the Apple store) on July 3, 2007 by using the iTunes program. Attached as Exhibit 1 is a true and correct copy of a screen shot of a portion of ATTM's account notes for Ms. Trujillo. The third entry from the top of that screen shot indicates that the device with IMEI number 011245000436384 was associated with Ms. Trujillo's wireless line (708) 259-1194 on account number 292397572. The top entry on that screen shot indicates that Ms. Trujillo used Apple's iTunes software to renew her service agreement on that line by agreeing to a 24-month commitment term.

9. According to ATTM records that I have reviewed, Plaintiff Jose Trujillo is not listed as an authorized user on Dawn Marie Trujillo's account number 292397572.

10. According to ATTM records that I have reviewed, Dawn Marie Trujillo cancelled this line of service on December 15, 2007. Ms. Trujillo was assessed and later paid an $175 early-termination fee.

11. According to ATTM records that I have reviewed, Plaintiff Jose Trujillo activated a different 2G iPhone for use with ATTM's wireless service on a new account in his name on July 5, 2007. The IMEI number of that iPhone is 011245004080345.

12. According to ATTM records that I have reviewed, on December 15, 2007, Mr. Trujillo cancelled his service with ATTM in order to port his wireless number to another carrier. Mr. Trujillo was assessed and later paid an $175 early-termination fee.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 8, 2009.

Caroline Mahone-Gonzalez